Supreme Court, U.S.
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No. 97-489

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES COLELLI,

Petitioner,

v.

CRUISER BOATS, a DIVISION OF KCS INTERNATIONAL INC. and CRUISTAR, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should deny the petition for a writ of certiorari by adhering to its well-established practice of deferring to the federal courts of appeals and the district courts on issues relating solely to state law, particularly when the decisions of the lower federal courts were wholly consistent with state-court precedent.

2. Whether this Court should deny the petition for a writ of certiorari where the decisions below have no precedential value either in Pennsylvania or in New Jersey and, therefore, affect only the parties to this case.

PARTIES TO THE APPEAL

Petitioner is an individual who is a resident of the state of New York. Respondent Cruistar, Inc., is a privately owned corporation with no parent and no subsidiaries and Respondent KCS International, Inc., is a privately owned corporation with no parent and no subsidiaries.

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OPINIONS OF THE COURTS BELOW

Respondents concur in the statement of opinions below recited in the petition.

JURISDICTION

This case comes before the federal courts under their diversity jurisdiction, 28 U.S.C. § 1332(a). This Court has jurisdiction according to 28 U.S.C. § 1254.

FEDERAL STATUTES OR OTHER PROVISIONS INVOLVED

None. The petition raises issues related only to the common law of Pennsylvania.

STATEMENT OF THE CASE

Procedural History

Respondents Cruistar, Inc. ("Cruistar"), and KCS International, Inc. ("KCS"), do not object to the description in the petition of the relevant procedural background.

Petitioner filed his petition for a writ of certiorari to the U.S. Court of Appeals for the Third Circuit on September 16, 1997.

Factual History

James Colelli suffered burns as a result of a fire aboard his fiberglass-hulled boat on June 25, 1993. The hull identification number on the boat indicated that it had been manufactured in 1972 by the Mirro Marine Division of Mirro Corporation.

The parties stipulated below that the Mirro Corporation sold its fiberglass-hulled boat manufacturing assets of the Mirro Marine Division to Cruistar in 1982. Bank One/Green Bay foreclosed on those assets in 1993 and sold them some months later to KCS International, Inc. *See* Memorandum and Order of the District Court (Appendix to the Petition at 5a—6a). As the parties stipulated, Mirro continued to exist after the 1982 asset sale to Cruistar and continues to exist today, although it lost its separate corporate

identity in 1988 and became a division of another corporation.

Petitioner never filed suit against Mirro and, three months after he commenced his action against Cruistar and KCS, the statute of limitations ran as against Mirro. *See* Memorandum and Order of the District Court (Appendix to the Petition at 16a—17a). As the district court held, "the determinative factor in the loss of a remedy against Mirro was Colelli's failure to name the proper defendant." *Id.* at 17a.

Having allowed the statute of limitations to run against the proper defendant, Petitioner was left to argue that the district court should hold Cruistar and KCS liable on a successor-liability theory. Cruistar and KCS moved for summary judgment and the district court ultimately granted the motions.

Before the district court, Petitioner raised a number of arguments in favor of successor liability; however, because he refers to just one in his petition, this discussion will be similarly focused.

In the memorandum accompanying its order granting summary judgment, the district court noted the well-established rule in Pennsylvania against imposing tort liability on successor corporations. *Id.* at 8a. The district court then considered, *inter alia*, an exception to that general rule denominated the "product-line" exception.

The product-line exception, a state-law doctrine, holds that liability can be imposed on a purported successor when all three of the following elements are met: (1) the plaintiff's remedy against the original manufacturer has been virtually destroyed and the destruction is caused by the successor's acquisition of the business; (2) the successor has the ability to assume the original manufacturer's risk-spreading role; (3) it is fair to require the successor to assume a responsibility for defective products as a burden necessarily attached to the original manufacturer's good will. *Id.* at 15a—17a. Importantly, the Pennsylvania Supreme Court has never placed its imprimatur on the "product-line" exception; its use in Pennsylvania law is the result of predictions by the intermediate appellate courts of the state and by the federal courts.[1]

In this case, the district court concluded that the "product-line" exception could not apply because the asset sale from Mirro Corporation to Cruistar in 1982 did not destroy Petitioner's remedy; rather, Petitioner lost his remedy by failing to bring suit against Mirro within the applicable statute of limitations. *Id.* at 17a. This holding did not stretch the law – the Pennsylvania state courts and the

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[1] There are two intermediate appellate courts in Pennsylvania, the Superior Court and the Commonwealth Court. 42 Pa. C.S. § 301. The Pennsylvania Supreme Court exercises largely discretionary review over the decisions of both. 42 Pa. C.S. § 724.

United States Court of Appeals for the Third Circuit had applied the exception in the same way. *See Conway v. White Trucks,* 885 F.2d 90, 93—97 (3d Cir. 1989) (emphasis added) (". . . we predict that the Pennsylvania Supreme Court, if it were to adopt the product line exception, would require the virtual destruction of the plaintiff's remedies against the original manufacturer ***caused by*** the successor's acquisition . . . We predict . . . that [Pennsylvania] would not apply [the product line] exception in cases where the claimant had a potential remedy against the original manufacturer, but failed to exercise all available means to assert his or her claim."); *LaFountain v. Webb Industries Corp.*, 951 F.2d 544, 547 (3d Cir. 1991), *quoting South Bend Lathe, Inc. v. Amsted Indus.*, 925 F.2d 1043, 1047 (7th Cir. 1991) ("[t]he continuation of the predecessor corporation bars recovery from the successor under the product line rule in every decision we have found that considers the issue."); *Keselyak v. Reach All, Inc.*, 660 A.2d 1350, 1354 (Pa. Super. 1995) (asset acquisition must cause the loss of remedy).

Petitioner appealed the entry of summary judgment in favor of Cruistar and KCS and the Third Circuit, by judgment order dated June 26, 1997, affirmed.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. The issues presented in the petition are wholly matters of Pennsylvania state law and this Court should apply its well-established rule of deferring to the federal courts of appeals and the federal district courts on matters of state law.

The Court's consideration of a petition for a writ of certiorari is guided by a number of criteria: whether there is a split of authority in the lower federal courts, whether the court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort, whether a lower federal court has so far departed from the accepted and usual course of judicial proceedings or whether the petition presents an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10.

The petition never recites these guidelines and for good reason: the questions Petitioner would put to this Court do not fall within any of the categories described.

As Petitioner must concede, his petition is bereft of any claim under the federal Constitution or any federal statute. Instead, the decisions of the district court and of the court of appeals rest entirely on an interpretation of Pennsylvania common law.

More precisely, the district court granted summary judgment in favor of Respondents because it found that, as a matter of Pennsylvania common law, they could not be held liable in a products-liability case for a boat manufactured by an alleged corporate predecessor. The only basis for federal jurisdiction was diversity of citizenship, 28 U.S.C. § 1332(a), and Petitioner raised no federal issues before either the district court or the court of appeals.

This Court has a long-standing practice by which it will "not ordinarily review the holding of a court of appeals on a matter of state law. . ." *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *see also, Wolf v. Weinstein*, 372 U.S. 633, 635 (1963) (. . . the controversy . . . primarily implicates questions of Pennsylvania law and presents no federal question of substance. In the circumstances, the writ of certiorari as to that judgment of the Court of Appeals is dismissed as improvidently granted."); *Cort v. Ash*, 422 U.S. 66, 72 (1975); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985); *Leavitt v. Jane L.*, 116 S.Ct. 2068, ___ (1996).[2]

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[2] The predecessor of Supreme Court Rule 10, Rule 19 of the 1970 rules, included among the bases for granting certiorari those situations in which the federal court of appeals has "decided an important state or territorial question in a way in conflict with applicable state or territorial law." Notably, when the rules were revised (and renumbered) in 1980, this enumerated basis for

In the case at bar, Petitioner has framed the issues for review as (1) whether the Third Circuit misapplied Pennsylvania law in light of a recent decision of an intermediate Pennsylvania appellate court and (2) whether the Third Circuit inappropriately applied the law because courts in New Jersey have applied a slightly different analysis.[3] These issues are purely based in state law and there is no reason for the Court to depart from its traditional reluctance to review decisions of the courts of appeals rooted in state law.

The Court should deny the petition.

II. The Court should deny the petition because there is no "sharp divergence" between the analysis applied by the lower courts in this case and the well-established caselaw in Pennsylvania.

Petitioner suggests that the analysis applied by the lower federal courts in this case is somehow at odds with the precedent of the Pennsylvania state courts. Petitioner cites *Childers v. Power*

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granting certiorari was eliminated. *See* Supreme Court Rule 10.

[3] Notably, although Petitioner describes the intermediate Pennsylvania decision as "recent," it was filed – and published – more than a month before the district court held oral argument on Respondents' summary-judgment motion.

Line Equipment Rentals, Inc., 681 A.2d 201 (Pa. Super. 1996), as supporting a result different than that reached by the district court and the court of appeals in the case at bar.[4]

Although there are significant factual distinctions that differentiate this case from *Childers*, Respondents will direct their argument to the standard by which this Court will consider the petition for a writ of certiorari.[5]

As an initial matter, even if one assumes, *arguendo*, that Petitioner is correct that there is

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[4] Although the point is largely irrelevant, Respondents are constrained to note an inaccuracy in the petition. Petitioner's description of the subsequent appellate treatment of *Childers* states that the Pennsylvania Supreme Court has granted allocatur – its form of discretionary review -- to consider the Superior Court decision. *See* Petition at 10. In fact, the Pennsylvania Supreme Court denied the petition for allocatur in *Childers*. 690 A.2d 236 (Pa. 1997).

[5] One of the more significant of these distinctions is that the Pennsylvania Superior Court described a rule that applied where "one corporation acquires ***all*** of the manufacturing assets of another corporation . . ." *Childers*, 681 A.2d at 213 (emphasis added). In the case presented in the instant petition, the parties stipulated that Mirro sold only one portion of its manufacturing assets to Cruistar. *See* Petition at 5.

some disparity between the application of the "product-line" exception in this case and the application of that doctrine in *Childers*, the point is immaterial because the district court was not obliged to follow *Childers*. It is hornbook law that a federal court exercising its diversity jurisdiction is to apply the law of the state as set down by the state's highest court. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). Where the state's highest court has not addressed an issue of state law, the federal court is to predict how that court would decide the matter. *Id.* The federal court may look, among other things, at decisions of the state's intermediate appellate courts. *Id.*

Childers is the product of an intermediate Pennsylvania appellate court and, to the extent that it recites a permutation of the "product-line" exception different than that applied by the lower federal courts in this case, *Childers* is not controlling. *Estate of Bosch*.[6] Moreover, as noted in the well-reasoned decision of the district court in this case, there is significant authority from the same intermediate appellate court – the Pennsylvania Superior Court – to suggest that the

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[6] Of course, even if the district court and the court of appeals had misapplied Pennsylvania law, that would not warrant a grant of certiorari. *See* Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 269-70 ("The Supreme Court cannot undertake to see that every case in a federal court is decided as a state court would have decided it.").

Childers approach is an aberration. *See, e.g. Keselyak v. Reach All, Inc.*, 660 A.2d 1350 (Pa. Super. 1995); *Dawejko v. Jorgenson Steel Co.*, 434 A.2d 106, 110 (Pa. Super. 1981). Accordingly, if this Court accepts Petitioner's reading of *Childers*, it can conclude only that there is a conflict among the panels of the Pennsylvania Superior Court, a conflict that should be resolved by the Pennsylvania Supreme Court (or an *in banc* Pennsylvania Superior Court) rather than by this Court. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("the voice adopted by the state as its own . . . should utter the last word.").

Critically, very few jurisdictions have accepted the "product-line" exception and the Pennsylvania Supreme Court has not resolved the issue definitively in that jurisdiction. *Dawejko*, 434 A.2d at 110. Accordingly, Petitioner is asking this Court not only to review the lower federal courts' analysis of a state-law doctrine but also to assume that the highest court in the state would agree that the doctrine has a place in Pennsylvania law. The Court's assumption of such a role would stand the *Erie* rule on its head. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). It would also establish a scenario in which this Court's interpretation of Pennsylvania law could be "overruled" by the Pennsylvania Supreme Court when that court addressed the product-line exception.

III. The Court should deny the petition because, even if it were to credit Petitioner's claim that a recent decision of an intermediate Pennsylvania appellate court diverges from the analysis applied by the district court in this case (and affirmed by the court of appeals), the issue was waived.

Petitioner has waived his argument. As Petitioner must concede, the district court adhered closely to the analysis of the "product-line" exception in the published decisions of the Third Circuit (as the district court was bound to do).

The Third Circuit panel that considered this matter was likewise bound to follow the published precedents of that court. *See* Third Circuit Internal Operating Procedure 9.1 ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so.").

The district court and the Third Circuit panel below followed the line of authority set down by the Third Circuit in *Conway v. White Trucks,* 885 F.2d 90 (3d Cir. 1989), and *LaFountain v. Webb Industries,* 951 F.2d 544 (3d Cir. 1991). Therefore, if Petitioner wished to preserve the issue he now raises for this Court's review, he was required to petition the Third Circuit for an *in banc* rehearing to overrule the prior precedent. He did not do so

and, accordingly, the issue has not been preserved for this Court's review.

IV. Petitioner's argument that New Jersey law should have some bearing on the determination of the lower federal courts in this diversity-jurisdiction matter is wholly without merit because the instant case is governed by Pennsylvania common law and the federal courts, sitting in diversity, properly applied Pennsylvania law.

Petitioner suggests that this Court should review the instant matter because "other Third Circuit states such as New Jersey show a sharp divergence from the federal court's interpretation of this issue." Petition at 17. He further argues that

> [t]o allow the Third Circuit to sanction the line of cases relied upon by Judge Vanaskie [the district court judge in the instant case] would provide precedent for district courts in New Jersey to follow. Therefore, federal courts in New Jersey could possibly diverge from state law in the same manner as in Pennsylvania

Petition at 19-20. Petitioner offers an alternative scenario, concluding that "[t]his would lead to a conflict within the Circuit that could create chaos." Petition at 20.

There is no reason to dwell long on Petitioner's argument. As an initial matter, it is illogical. Petitioner seems to argue that, because the courts of Pennsylvania and New Jersey are within the federal Third Circuit and because they have incorporated parts of one anothers' analyses of the "product-line" exception, the result in this case would somehow wreak havoc on the law of New Jersey. The district court in this case applied Pennsylvania law as it was required to do; the Third Circuit affirmed by judgment order. The case did not implicate New Jersey law and, presumably, the Third Circuit would apply an appropriate standard were it to review a case arising from New Jersey.

Petitioner's argument seems to presume that the Third Circuit, the U.S. District Court for the District of New Jersey and the New Jersey state courts are unable to discern between Pennsylvania and New Jersey law and would somehow uproot the law of that state in deference to an unpublished decision by a district court in Pennsylvania that clearly indicated it was applying Pennsylvania law.

Put another way, Petitioner is suggesting that the Third Circuit had some duty to reconcile the common law of two states as though Pennsylvania and New Jersey are not free to diverge from one another. The court of appeals had no such duty and, of course, such an exercise would run afoul of *Erie*.

Beyond that, the decisions of the lower federal courts in this case do not establish any precedent. The district court did not publish its decision and, even if it had, district court decisions are not binding on any other court (indeed, they are not even binding on other judges of the same district court). *See Chemetron Corp. v. Jones*, 72 F.3d 341, 352 (3d Cir. 1995); *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991). The Third Circuit affirmed with a judgment order that, likewise, has no precedential import. *See* Third Circuit Internal Operating Procedure 5.8 ("Because the court historically has not regarded unpublished opinions as precedents that bind the court, the court by tradition does not cite to its unpublished opinions as authority.").

Accordingly, Petitioner's attempt to cast this case as one with dire results for both Pennsylvania and New Jersey courts is belied by the lower courts' clear reliance on Pennsylvania law and by the procedural posture of this case; the only effect of the decisions of the lower federal courts in this case is on the litigants named in the caption. The case should not, therefore, command the resources of this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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